

These are the tentative rulings for civil law and motion matters set for Thursday, June 19, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, June 18, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. Telephone appearances through June 2014 will continue to be governed by the current Local Rules. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0058702 Smith, Shaun vs. Wood, Katherine D.

The motion to set aside default and default judgment is continued to June 26, 2014 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones. The court apologizes for any inconvenience to the parties.

2. M-CV-0061291 Granite Oaks Apartments, LLC vs. Wheeler, Renee

Appearance is required on June 19, 2014 at 8:30 a.m. in Department 40.

3. S-CV-0022800 Martinez-Senftner Law Firm, et al vs. Alcaraz, Lilia G.

Defendant Martinez-Senftner Law Firm's Motion to Dismiss

Defendant and cross-complainant Martinez-Senftner Law Firm's ("Martinez-Senftner's") request for judicial notice, in connection in its moving papers, is granted. Martinez-Senftner's request for judicial notice, in connection with its reply brief, is denied. Martinez-Senftner's objection to the declaration of Lyle Solomon is sustained.

Martinez-Senftner moves to dismiss Placer County Superior Court Case No. SCV-22734, *Lilia G. Alcaraz v. The Martinez Senftner Law Firm, et al.*, pursuant to Code of Civil Procedure sections 583.310, 583.360, and 583.410-583.430.

Under Code of Civil Procedure section 583.310, an action must be brought to trial within five years after it is filed, unless, under section 583.340(c), “[b]ringing the action to trial ... was impossible, impracticable, or futile.” The purpose of the five-year statute is to prevent avoidable delay, and therefore the exception allows for circumstances beyond the plaintiff’s control, where moving the case to trial is impracticable for all practical purposes. *Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 328. In a jury trial, the action is brought to trial when the jury is impaneled or sworn. *Hartman v. Santamarina* (1982) 30 Cal.3d 762, 765-767.

Plaintiff Lilia Alcaraz (“Alcaraz”) filed the subject complaint on April 4, 2008. Based on the date the complaint was filed, the five year deadline for bringing the case to trial expired on April 4, 2013. Prior to the first scheduled trial date of September 14, 2009, the parties stipulated to continue the trial date, and trial was re-set to June 1, 2010. Prior to the June 1, 2010 trial date, Martinez-Senftner moved to continue the trial date, which request was granted, and trial was continued to October 25, 2010. The court then continued the October 25, 2010 trial date to April 4, 2011. Prior to the April 4, 2011 trial date, Martinez-Senftner moved again for a trial continuance based on the serious illness of Gloria Martinez-Senftner, and trial was continued to October 3, 2011. However the case did not go to trial on October 3, 2011, and the parties assert that they were placed in “trailing” status at that time. It appears that no further action was taken in this case until Martinez-Senftner filed the instant motion to dismiss, more than 2 1/2 years after the last scheduled trial date.

Alcaraz asserts that it was either impossible or impracticable for her to bring the case to trial within the five year deadline, due to courtroom unavailability and/or trial date continuances that were not requested by her. In determining whether the impracticability exception applies, the court must find the following three factors: (1) a circumstance of impracticability; (2) a causal connection between that circumstance and the plaintiff’s failure to move the case to trial; and (3) that the plaintiff was reasonably diligent in moving the case to trial. *Tamburina, supra*, 147 Cal.App.4th at 328. The plaintiff has the burden of proving these factors. *Id.* at 328.

With respect to the numerous trial date continuances prior to the last trial date of October 3, 2011, Alcaraz fails to show a causal connection between the continuances and plaintiff’s failure to move the case to trial. Indeed, taking into account each of the continuances by the court or the parties, the matter was last set for trial approximately 18 months before the expiration of the 5-year deadline. Alcaraz does not argue that these trial continuances caused her to be unable to move the case to trial. As Alcaraz fails to establish a causal connection between the continuances and expiration of the 5-year deadline, the impracticability exception cannot apply to the continuances of the trial date prior to the October 3, 2011 trial date.

Thus, the sole remaining question is whether the five-year limitations period should be tolled from October 3, 2011, to the present, during the time the parties contend the case was “trailing”. For purposes of examining this circumstance, the court must determine whether plaintiff exercised reasonable diligence in prosecuting the case. “Because the purpose of the five-year statute for bringing a case to trial is to prevent *avoidable* delay for too long a period, the ‘critical factor’ as to whether the impracticability exception applies to a given factual situation is whether the plaintiff has exercised ‘reasonable diligence’ in prosecuting his or her case. [Citations.] This duty of diligence applies ‘at all stages of the proceedings,’ and the level

of diligence required increases as the five-year deadline approaches. [Citations.] The exercise of reasonable diligence includes a duty ‘to monitor the case in the trial court to ascertain whether any filing, scheduling or calendaring errors have occurred.’ [Citations.]” *Tamburina, supra*, 147 Cal.App.4th at 336.

The court has taken judicial notice of the file in this action. The last minutes in the file are from an October 20, 2011 settlement conference, and state, “All parties present for settlement conference. Settlement conference held. With no resolution the matter is continued on trailing for trial status.” There is no indication from the file as to anything that happened after that date, prior to this motion being filed. No continued trial date was set. Based on these minutes, Alcaraz contends that a courtroom remained unavailable for the past 2 1/2 years, and there was nothing that she could do to bring the matter to trial.

There is nothing in the file to indicate that Alcaraz at any point in the last three years brought to the court’s attention that the five-year limitation period expired in April 2013. Alcaraz failed to alert the trial court that the five-year deadline was approaching, and essentially acquiesced in allowing the date to pass. Alcaraz had a duty to take whatever measures were available to attempt to have the case set for trial. At the time the case supposedly entered into “trailing” status, there was ample time to take steps to alert the court to the potential problem and request action. Alcaraz was not entitled to assume that a motion to specially set the case for trial within the five-year period would have been futile. *See* *Wale v. Rodriguez* (1988) 206 Cal.App.3d 129, 133. Indeed, following the filing of Martinez-Senftner’s motion to dismiss, Alcaraz has now taken the step of filing a motion to specially set the case for trial. The filing of this motion belies Alcaraz’s argument that she was precluded from taking any steps within the past three years to alert the court to the five year mandatory dismissal deadline.

Reasonable diligence is a critical factor to be considered in determining whether the impracticability exception applies. *De Santiago v. D and G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 375. In this case, Alcaraz was not reasonably diligent in prosecuting her case. Alcaraz cites to *Chin v. Meier* (1991) 235 Cal.App.3d 1473 in support of the proposition that the five-year period is automatically tolled based on trial continuances caused by the unavailability of a courtroom. The *Chin* court held that when there is a court-ordered continuance, “[t]he trial court must merely subtract the aggregate periods of time attributable to each court-ordered continuance because of courtroom unavailability.” *Id.* at 1478. However, the holding in *Chin* was expressly rejected by the court in *De Santiago v. D and G Plumbing, Inc., supra*, 155 Cal.App.4th at 376 (“[w]e thus reject *Chin* to the extent it concludes that the trial court must merely subtract the aggregate periods of time attributable to each court-ordered continuance because of courtroom unavailability, without considering whether the plaintiff was reasonably diligent in bringing the case to trial, particularly as the five-year mark approaches.”) While there appears to be a split of authority, the court believes that the reasoning of *De Santiago* is more in line with the intent of the legislature in enacting Code of Civil Procedure section 583.340(c). To conclude otherwise would lead to absurd results, as in this case, where the plaintiff was seemingly content to allow years to pass after her last contact with the court without taking any action to bring the case to trial.

Plaintiff, not the court, was responsible for moving the matter to trial. “An available remedy is at hand to correct calendaring or other errors made by the court or its clerk in the scheduling of a case. Upon timely discovery of the problem, a motion to specially set may be made and the court is bound to grant it. [Citations.]” *Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280, 1289. Plaintiffs have a duty to exercise reasonable diligence in moving the case along, including the duty “ ‘to monitor the case in the trial court to ascertain whether any filing, scheduling or calendaring errors have occurred.’ ” *De Santiago v. D & G Plumbing, Inc.*, *supra*, 155 Cal.App.4th at 373. Additionally, plaintiffs have a continuing duty to compute the five year deadline correctly and to advise the court of an impending deadline. *Wale v. Rodriguez*, *supra*, 206 Cal.App.3d at 133.

It appears that in this case, plaintiff’s counsel did nothing more than rely on informal conversations between cross-defendant’s attorney and an unidentified courtroom clerk who indicated that “the case ... remains in a trailing status awaiting a Judge and a Courtroom to be assigned.” (Solomon decl., ¶ 6.) There is nothing in the file to explain the failure to reset a trial date, and there is nothing indicating that plaintiff requested a status conference, or moved for any potential relief, in order to bring the issue to the court’s attention. Plaintiff bears the burden of showing reasonable diligence in prosecuting the case at all stages of proceedings by clear and convincing evidence. *Perez v. Grajales* (2009) 169 Cal.App.4th 580, 590. Plaintiff’s showing, which amounts to nothing more than off-the-record conversations by an attorney for another party who did not share plaintiff’s burden of moving the case to trial, falls far short of this standard.

Accordingly, plaintiff’s action is subject to mandatory dismissal pursuant to Code of Civil Procedure section 583.310.

Martinez-Senftner alternatively requests dismissal pursuant to Code of Civil Procedure section 583.410, *et seq.* Section 583.410(a) provides that the court may dismiss an action in its discretion for delay in prosecution. Grounds for dismissal include the failure to bring an action to trial within three years after it is commenced against the defendant. Code Civ. Proc. § 583.420(a)(2). Based on the reasons set forth with respect to mandatory dismissal, the court also finds that this case is subject to discretionary dismissal pursuant to Code of Civil Procedure sections 583.410, *et seq.*

Based on the foregoing, Martinez-Senftner’s motion to dismiss is granted.

Lilia Alcaraz’s Motion to Dismiss

Alcaraz moves to dismiss the remainder of this consolidated action, Placer County Superior Court Case No. SCV-22800, *Martinez-Senftner Law Firm, P.C., et al. v. Lilia Alcaraz, et al.* Martinez-Senftner concedes that dismissal of the entire consolidated action (Case Nos. SCV-22734 and SCV-22800) is appropriate based on the five year mandatory dismissal statute. Code Civ. Proc. § 583.310.

Accordingly, Alcaraz’s motion to dismiss is granted.

Lilia Alcaraz's Motion to Specially Set Case for Trial

In light of the ruling on the motion to dismiss, Alcaraz's motion to specially set case for trial is denied as moot.

4. S-CV-0024894 Cappa, David - In Re the Petition of

Respondent's motion to dismiss for failure to prosecute is granted. This action was filed on May 12, 2009, and petitioner has failed to bring the action to trial within five years. Code Civ. Proc. §§ 583.310, 583.360. Accordingly, dismissal is mandatory.

5. S-CV-0030186 Kostiz, Patrick D. vs. Rosene Classics, Inc., et al

Plaintiff's motion to bifurcate trial shall be deferred to be heard by the judge assigned to hear trial in this matter.

6. S-CV-0030446 Trangsrud, Claudine, et al vs. Del Webb California Corp. et al

Financial Pacific Insurance Company's motion for leave to intervene on behalf of cross-defendant Image Landscape, Inc. is granted. Moving party shall file and serve its complaint-in-intervention by no later than June 27, 2014.

7. S-CV-0031655 Smith, Gus E., et al vs. Doug Gray Construction & Drywall

Cross-defendant James B. Guertin dba Norcal Plastering's motion to set aside default is granted. Moving party shall file and serve his answer to the cross-complaint by no later than June 27, 2014.

8. S-CV-0033109 Kelley Construction, Inc. vs. Sterling Iron Works, Inc.

Defendant Sterling Iron Works, Incorporated's motion for leave to file a cross-complaint is granted. Defendant shall file its cross-complaint by no later than June 27, 2014.

9. S-CV-0033842 Sweda, John L., et al vs. Ford Motor Company

The demurrer to second amended complaint, motion to strike and motion for protective order are continued to July 3, 2014 at 8:30 a.m. in Department 40.

10. S-CV-0033906 Winterhawk Homeowners Ass'n, et al vs. Riverside Mgmt.

The demurrer to third amended complaint is continued to July 10, 2014 at 8:30 a.m. in Department 40.

11. S-CV-0033972 Lacy, Carolyn, et al vs. Bank of America, N.A., et al

The demurrer to first amended complaint is continued to June 26, 2014 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones. The court apologizes for any inconvenience to the parties.

12. S-CV-0034435 Alliance for the Protection of Auburn vs. Placer County, et al

This tentative ruling is issued by the Honorable Charles D. Wachob:

Appearance is required on June 19, 2014 at 8:30 a.m. in Department 42.

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